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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSHUA NEIL HARRELL,  
Plaintiff,  
v.  
MICHELLE BELYEA,  
Defendant.

No. 2:15-cv-00576-JAM-AC

ORDER

Plaintiff is proceeding in this action pro se. The action was accordingly referred to this court for pretrial proceedings by E.D. Cal. R. (“Local Rule”) 302(c)(21).<sup>1</sup> On June 23, 2016, the district judge presiding over this case authorized plaintiff, who is also proceeding in forma pauperis, to proceed with his first amended complaint against defendant Michelle Belyea. ECF No. 24. Now pending before the court are plaintiff’s motion to compel (ECF No. 66), defendant’s motion for summary judgment (ECF No. 76), plaintiff’s motion to strike (ECF No. 86), plaintiff’s motion for an extension of time to reply to defendant’s opposition to plaintiff’s motion to strike (ECF No. 93), and plaintiff’s motion to protect due process (ECF No. 99).

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<sup>1</sup> Although plaintiff indicates that he is in custody, this matter is proceeding under the authority of Local Rule 302(c)(21), rather than Local Rule 302(c)(17), because plaintiff does not seek habeas relief, nor does he challenge the conditions of his confinement.

1 **I. Relevant Procedural Background**

2 The case arises out of plaintiff's arrest and prosecution for commercial burglary (Penal  
3 Code § 459) and probation violation (Penal Code § 1203.2). Plaintiff was arrested for these  
4 crimes on April 17, 2014. ECF No. 15 at 10-24. The criminal case was ultimately dismissed. Id.  
5 at 11. Plaintiff filed this civil case on March 13, 2015 against defendants Rashad Figaro,  
6 Walmart, Fairfield Police Department, Solano County District Attorney's Office, Natasha  
7 Jontulovich, and District Attorney Donald A. Du Bain. ECF No. 1 at 3.

8 Upon screening pursuant to 28 U.S.C. § 1915(e)(2), the court found plaintiff alleged facts  
9 to potentially support three claims: Fourth Amendment unlawful arrest; Fourth Amendment Due  
10 Process (based upon false imprisonment); and Fourteenth Amendment Due Process (based upon  
11 malicious prosecution). ECF No. 8 at 3. However, the court found that complaint stated a claim  
12 against defendant Michelle Belyea only. ECF No. 8 at 6. The court permitted the unlawful arrest  
13 claim to go forward against Belyea, while dismissing the false imprisonment and malicious  
14 prosecution claims against her, with leave to amend. Id. at 4. Plaintiff was given 30 days to  
15 amend his complaint to state a cognizable claim against the remaining defendants, should he wish  
16 to do so. Id. at 6.

17 Following an extension of time, plaintiff timely filed a first amended complaint ("FAC")  
18 alleging claims against Belyea, as well as Rashad Figaro, Garrison, and Judge Bowers. ECF No.  
19 15. Upon screening of the FAC, the court found that plaintiff alleged facts that could potentially  
20 support three claims: Fourth Amendment unlawful arrest; Fourth Amendment Due Process (based  
21 upon false imprisonment); and Fourteenth Amendment Due Process (based upon malicious  
22 prosecution). ECF No. 20 at 3. The court dismissed defendants Rashid Figaro, Garrison, and  
23 Judge Bowers with prejudice and ordered plaintiff's FAC served with respect to defendant Belyea  
24 on two grounds: (1) Fourth Amendment unlawful arrest; and (2) Fourteenth Amendment  
25 malicious prosecution (only based upon the limited allegation that Belyea falsified a police  
26 report). ECF No. 20 at 4-7, ECF No. 24.

27 Plaintiff's FAC was served upon Belyea (ECF No. 39), who filed an answer on April 18,  
28 2017. ECF No. 40. On January 18, 2019, the court issued a revised scheduling order setting a

1 discovery deadline of May 9, 2018. ECF No. 52. A dispositive motions deadline was set for July  
2 9, 2018. Id.

## 3 **II. Plaintiff's Motion to Protect Due Process**

4 Plaintiff filed a motion notifying the court that through studying his own genealogy, he  
5 recently discovered that he has a relative that was in North America before the United States was  
6 formed and that his eighth-great grandfather is "Sir Bathwater" of Wales, England. ECF No. 99 at  
7 1. Plaintiff asks the court to provide him with more information regarding his family genealogy  
8 to protect his rights to due process. Id. at 2. Plaintiff's memorandum indicates he believes he is  
9 entitled to some financial inheritance from his relatives' estates. Id. at 3-11. Because plaintiff's  
10 motion is entirely irrelevant to this case and does not seek any relief with respect to the remaining  
11 defendant, it is DENIED.

## 12 **III. Motion to Compel**

13 Plaintiff moves to compel responses to his requests for production numbered 3, 4, and 5.  
14 ECF No. 66 at 2. Plaintiff's RFP No. 3 asks defendant to produce two document affidavits from  
15 management persons at Walmart located on N. Texas St., Fairfield, CA, stating facts about the  
16 operations, rules, and policies about dressing rooms for customers. ECF No. 66 at 2. Plaintiff's  
17 RFP No. 4 requests all documents, pleadings, orders, materials, records and files filed in this case.  
18 Id. Plaintiff's RFP No. 5 seeks defendant's personnel file at the Fairfield Police Department to  
19 include pleadings and materials about defendant that may contain Brady material. Id.

20 Plaintiff's motion to compel is DENIED because defendant has served adequate  
21 responses. With respect to RFPs 3 and 4, defendant served a response stating she had no  
22 responsive documents; defendant does not have access to Walmart's internal documents, and  
23 there are no Brady related materials in defendant's personnel file. ECF No. 70 at 3. In the  
24 absence of evidence to the contrary, plaintiff is required to accept defendant's responses to these  
25 requests that, despite a diligent search, no responsive documents exist. See e.g., Mootry v. Flores,  
26 2014 WL 3587839, \*2 (E.D. Cal. 2014) ("Defendants cannot be required to produce documents  
27 that do not exist. Absent evidence to the contrary, which has not been presented, Plaintiff is  
28 required to accept Defendants' response no such documents exist."); accord, Holt v. Nicholas,

1 2014 WL 250340, \*4 (E.D. Cal. 2014) (“Absent evidence to the contrary, which has not been  
2 presented, Plaintiff is required to accept Defendant’s amended response that no such documents  
3 responsive to his request exist.”).

4 With respect to RFP No. 5, defendant asserts she responded to the request by providing a  
5 complete copy of the record of the court’s file, inclusive of approximately 275 pages. ECF No.  
6 70 at 3. While plaintiff now contends that he is entitled to a copy of his own deposition  
7 transcript, defendant correctly responds that she is not under any obligation to produce the  
8 transcript, which is equally available to the plaintiff, albeit at cost. See, *Rodgers v. Martin*, No.  
9 1:12-CV-01686-AWI, 2014 WL 4344499, at \*7 (E.D. Cal. Aug. 29, 2014) (Seng, J.). Plaintiff  
10 may not use the discovery process to obtain free copies of documents that are equally available to  
11 him. The Federal Rules of Civil Procedure direct deposition officers to provide a copy of a  
12 deposition transcript to the deponent or any party upon payment of reasonable charges. Fed. R.  
13 Civ. P. 30(f)(3). Thus, defendant has adequately responded to plaintiff’s RFP No. 5 and need not  
14 provide plaintiff with a copy of his deposition transcript.

15 For the above reasons, plaintiff’s motion to compel (ECF No. 66) is DENIED.

#### 16 **IV. Motion to Strike and Motion for Extension of Time**

17 Plaintiff moves to strike the declaration of Michelle Belyea filed in support of her motion  
18 for summary judgement. ECF No. 86. He also seeks additional time to respond to defendant’s  
19 opposition to this request. ECF No. 93. These motions are DENIED without prejudice as  
20 MOOT, because the summary judgment is being vacated for the reasons now explained.

#### 21 **V. Motion for Summary Judgment**

22 Defendant’s motion for summary judgment (ECF No. 76) must be VACATED because  
23 defendant failed to file a Rand Notice with their motion. As defendant was warned in the Order  
24 Directing Service in this case, in the event “defendant moves for summary judgment, defendant  
25 must contemporaneously serve with the motion, but in a separate document, a copy of the  
26 attached Rand Notice. See *Woods v. Carey*, 684 F.3d 934, 935 (9th Cir. 2012); *Rand v. Rowland*,  
27 154 F.3d 952, 957 (9<sup>th</sup> Cir. 1998).” ECF No. 35 at 4. Because defendant did not file a Rand  
28 Notice, her motion for summary judgment cannot be considered at this time. Accordingly, it will

1 be VACATED without prejudice to re-filing in compliance with defendant's obligations under  
2 Rand. Defendant may file the same motion for summary judgment, exhibits, and declaration, but  
3 she must do so contemporaneously with a Rand Notice.

4 **VI. Conclusion**

5 For the reasons discussed above, it is hereby ORDERED that:

- 6 1. Plaintiff's motion to protect due process (ECF No. 99) is DENIED;
- 7 2. Plaintiff's motion to compel (ECF No. 66) is DENIED;
- 8 3. Plaintiff's motion for an extension of time (ECF No. 93) is DENIED as MOOT;
- 9 4. Plaintiff's motion to strike (ECF No. 86) is DENIED as MOOT;
- 10 5. Defendant's motion for summary judgment, ECF No. 76, is VACATED without  
11 prejudice to re-filing and service together with a Rand notice.

12 DATED: November 6, 2018

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14 ALLISON CLAIRE  
15 UNITED STATES MAGISTRATE JUDGE  
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